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THE COMBINATION LAWS AS ILLUSTRATING THE RELATION BETWEEN LAW AND OPINION IN ENGLAND DURING THE NINETEENTH CENTURY.[1]

NO portion of English legislation exhibits in a more striking light the close connection during the nineteenth century between the development of the law and the varying currents of public opinion than do the changes made from 1800 up to the present day in the combination law. My aim in this article is to trace out this intimate connection.

For the due comprehension, however, of the matter in hand, my readers must bear in mind three preliminary considerations.

First. The term "combination law" has, to an English lawyer, a peculiar and somewhat narrow significance.

The combination law, as the expression is used in this article and generally by English judges and lawyers, means the body of legal rules or principles which from time to time regulate the right of workmen on the one side to combine among themselves for the purpose of determining by agreement the terms on which, and especially the rate of wages at which, they will work, or, in other words, sell their labour; and the right of masters, on the other side, to combine among themselves for the purpose of de-

[1] See Wright, Law of Criminal Conspiracies. See Erle, Trade Unions; 3 Stephen, Hist. Crim. Law 206–227.

termining by agreement the terms on which, and especially the rate of wages at which, they will engage workmen, or, in other words, purchase labour.

Secondly. The combination law as thus described is merely one part of a far wider subject, namely, the legal rules regulating the exercise of a right which exists in every country, but, while under English law it has scarcely acquired a definite name, is known on the Continent and notably in France as the right of association; this right of association further is a right marked by certain special characteristics.

This right of association is nothing more than the right of two or more citizens, X, Y, and Z, to combine together by agreement among themselves for the attainment of a common purpose. This purpose or end may be of no more intrinsic importance than the formation of a dining club. It may be, on the other hand, as important as the formation of the Jacobin Club, which became the real government of France; but whether the end for which men combine be trivial or of overwhelming consequence, wherever you have union there you have an exercise or a claim to exercise the right of association. Now, one peculiarity of this right is that it may be regarded from two different points of view. It may be regarded as a mere extension of each citizen's individual freedom, that is, of his right to manage his own affairs in his own way as long as he does not trench upon the legal rights of his neighbours, whence it apparently follows [1] that whatever course of action X or Y or Z may lawfully pursue when acting without agreement, that course of action X, Y, and Z may all of them lawfully pursue when acting together under an agreement; and this undoubtedly is in general, though not without considerable limitations, the doctrine of English law: if X, Y, and Z may each of them lawfully advocate free trade or fair trade, they may assuredly all of them together with a thousand more of their friends

[1] "The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. . . . The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. . . . In the part which merely concerns himself, his independence is, of right, absolute." Mill, On Liberty (ed. 1859) 21, 22. *Cf. ibid.* 27.

"Every person has a right under the law, as between him and his fellow subjects, to full freedom in disposing of his own labour or his own capital according to his own will." Erle, Trade Unions 12.

form an Anti-Corn Law League or a Fair Trade League. If X or Y or Z may each of them lawfully, as is certainly the case, cut A because of his hateful religious or political opinions, they may all, it would seem, agree together to cut him. Nor is it easy to maintain that they have not *prima facie* a right to advise or induce their friends to enter into a similar agreement; and this line of reasoning suggests, at any rate, the result that a federation of employers may lawfully agree never to employ A, though a good workman, because he has taken a leading part in a strike, and that a body of Trade Unionists may agree never to work together with non-unionists and especially not with a notorious blackleg, B, whom his former friends hold a traitor to the cause of Unionism. Does not the same view make it lawful for a body of workmen to agree that they will have no dealings with any factory where B is allowed to work, or, to carry the matter a step further, with any employer or merchant who has any dealings with a factory where B is employed to work? But this example brings us across a quite different and indeed opposite aspect of the right of association. It may be looked upon as a right of a very peculiar character, the exercise whereof leads to results which may conceivably be injurious both to individuals and to the public. When a body of twenty or two thousand or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a body which, by no fiction of law but from the very nature of things, differs from the individuals of whom it is constituted. *Esprit de corps* is a real and powerful sentiment; it drives men to act either above or, still more often, below the ordinary moral standard of their conduct as individuals. What, at any rate, is certain is that a body created by combination, whether a political league, a church, or a trade union, limits in some degree the freedom of its members. Its power is created by the surrender of individual liberty on the part of each of its associates, and a society may from this surrender acquire far greater strength than could be exercised by the whole of its members acting separately; a disciplined regiment acting under command is a far more formidable assailant than a thousand men who, even though armed, act without discipline or combination. Note here this further result: an association not only limits the freedom of its members, but threatens to cut short, and indeed of necessity does cut short, the individual freedom of persons who stand outside the associated body. Who can doubt that private citizens have often

found it morally impossible to resist the commands of a political association or of a powerful church? Can it be seriously maintained that a workman preserves full freedom of action when he knows that if he takes part in a strike he may ultimately be deprived of employment by the authority of a federation of employers? Has a workman, on the other hand, the liberty which the law ought to secure to every orderly citizen if he knows that the refusal to join a union may make it impossible for him to obtain employment throughout the length and breadth of the United Kingdom, and also, it may be, should the trade unionists of England and the trade unionists of America enter into a tacit alliance, throughout the length and breadth of the United States? Hence the right of association has a paradoxical character: a right which from one point of view seems to be a necessary extension of individual freedom is, from another point of view, fatal to that individual freedom of which it seems to be a mere extension.

Thirdly. This paradox raises a problem which at this moment in all civilized countries perplexes moralists and thinkers no less than legislators and judges: How is the right of association to be reconciled with each man's individual freedom? Curtail the right of association and personal liberty loses half its value. Give to the right of association unlimited scope and you destroy, not the mere value, but the existence of personal freedom.

The problem takes different shapes in different countries. In France it appears as a question of religious freedom. In the United States it excites and complicates the agitation against trusts. In Ireland it disturbs the whole relation between landlord and tenant, and compels the inquiry how far a boycott is a criminal conspiracy, or whether boycotting can be defended under the specious alias of exclusive dealing.[1] In England the limits of the right of association have hitherto been considered mainly, and indeed too exclusively, in reference to trade combinations either among workmen or employers; the alterations in the combination law will be found to be a series of attempts to solve the problem raised by the right of association and to adjust a conflict of rights,[2] namely, the right of X, Y, and Z to combine

[1] At this moment [20 April, 1904] it threatens at Limerick to take the form of a question as hateful as it is dangerous, whether traders are to be denied the rights of other British citizens because they adhere to their inherited Judaism.

[2] Such a conflict of rights may easily arise without any relation to the right of association. The law of libel and slander, for instance, is nothing but a rough attempt to maintain, on the one hand, X's right to what is popularly though inaccurately called

freely together for any purpose not definitely illegal, and the right, on the other hand, of every individual A not to be deprived by the concerted action of X, Y, and Z of that right to manage his own affairs in his own way which English law treats as the very essence of personal freedom.

The changes in the combination law are then attempts to fix the limits of the right of association in regard to trade disputes, and may be brought under four heads, which are the Tory legislation of 1800; the Benthamite reform of 1824–25; the compromise of 1875, represented by the Conspiracy and Protection of Property Act, 1875; the judicial interpretation of that Act, 1890–1904. Each of these changes bears a different character; each accurately corresponds with the opinion of the time when it took place.

(A) The combination law of 1800. The Combination Act, 1800, 40 Geo. 3, c. 106,[1] aimed in reality at one object, namely, the suppression of all combinations of workmen, whether transitory or permanent, of which the object was to obtain an advance of wages or otherwise fix the terms of employment. It was really an act for the suppression of strikes and of trade unions. The severity of the statute can be realised only by a minute study of its different provisions, to enter into which would be alien to my present purpose. Two illustrations may suffice. Under the Act it is made an offense (to put the matter shortly) to assist in maintaining men on strike:[2] persons guilty of this or any other offense under the Act are made liable to conviction on summary procedure before justices of the peace.[3]

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freedom of speech or freedom of opinion, and at the same time to protect A's right not to be damaged by the false or reckless statements of X. This example deserves notice because, after about a century of legislation, the law of libel has resulted in a roughly satisfactory adjustment of rights constantly tending to come into conflict. This fact gives some reason to hope for an ultimate adjustment of the conflict between the right of association and the right to individual freedom of action.

[1] It re-enacts in substance the Combination Act of 1799, 39 Geo. 3, c. 81. See generally as to the Combination Act, 1800, 3 Stephen, Hist. 306; Wright 12.

[2] 3 Stephen, Hist. 208.

[3] The maintenance of this summary jurisdiction is a feature of subsequent Combination Acts (5 Geo. 4, c. 95, s. 7; 6 Geo. 4, c. 129, s. 6, Conspiracy and Protection of Property Act, 1875, s. 10). Under the last Act, however, the accused has the option of trial on indictment before a jury (see, for the reasons in favour of this summary jurisdiction, Report of Committee on Combination Laws, 1875, pp. 10, 11). The desirability of obtaining a ready method for the punishment of trade offenses, which could only be effected by Act of Parliament, should be noted. It invalidates the argument that conduct made an offense under *e. g.* the Combination Act, 1800, could not be an offense at common law, since if punishable at common law it would not have been made an offense by statute.

One feature of the great Combination Act is sometimes (because of its small practical importance) overlooked. The statute imposes a penalty upon combinations among masters for the reduction of wages or for an increase in the hours or the quantity of work. To an historian of opinion this provision is of importance. It shows that in 1800 Parliament was in theory opposed to every kind of trade combination.

Behind the Combination Act — and this is a matter for my purpose of primary importance — there stood the law of conspiracy.[1] As to the exact nature of this law as then understood it would be rash to express one's self with dogmatic confidence. There are one or two features, however, of that law as it stood in 1800 of which it may be allowable to write with a certain degree of confidence.

First. The law of conspiracy had by the end of the eighteenth century received under judicial decisions a very wide extension.[2]

Secondly. A conspiracy, it is submitted, included in 1800 a combination for any of the following purposes; that is to say:

(1) For the purpose of committing a crime.[3]

(2) For the purpose of violating a private right in which the public has a sufficient interest[4] [*i. e. semble* for the purpose of committing any tort or breach of contract which materially affects the interest of the public].[5]

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[1] Sir William Erle, Sir Robert S. Wright, Sir J. F. Stephen, all of them judges, have each published on this subject books of authority. A study of their writings leaves on my mind the impression that these eminent authors have each arrived at somewhat different conclusions, and that they each felt the law of conspiracy to be obscure.

[2] Wright's work — not republished since he was raised to the bench — contains elaborate arguments to show that this extension was illegitimate, and was not really supported by the authorities on which it is supposed to rest. From a merely historical point of view these arguments are of great force, but from a legal point of view their effect is diminished by the reflection that similar arguments if employed by a lawyer of as much historical information and of as keen logical acumen as Sir R. S. Wright, would shake almost every accepted principle of English law, in so far as it does not depend upon statute. In any case Wright's arguments are for my present purpose irrelevant; my object is to state, as far as may be, not what the law of conspiracy ought to have been, but what it was in 1800.

[3] "It is undisputed law that a combination for the purpose of committing a crime is a crime" (Erle 31), and this whether the crime is known to the common law or is created by statute.

[4] Erle 32.

[5] It is arguable in spite of Turner's Case, 13 East 228, that a combination to commit any tort or for the breach of any contract with a view to damage any person, is a conspiracy, but it is not necessary for our purpose to state the law as widely as this. See Kenny, Outlines of Crim. Law 288–290.

(3) For any purpose clearly opposed to received morality or to public policy.[1]

Thirdly. Since a combination to commit a crime is *ipso facto* a conspiracy, it follows that a combination for any purpose made or declared criminal by the Combination Act, 1800, *e.g.* a combination to collect money for the support of men on strike, was in 1800 an undoubted conspiracy.

If we bear these features of the law of conspiracy in mind and recollect that the Combination Act was not intended to render unlawful any bargaining, *e.g.* as to the rate of wages between an employer and an individual workman, the combined result of the Combination Act in 1800, and the law of conspiracy, or, in other words, of the combination law as it stood at the beginning of the nineteenth century, may be thus broadly summed up: Any artisan who organized a strike or joined a trade union was a criminal and liable on conviction to imprisonment. The strike was a crime, the trade union was an unlawful association. The whole idea on which the law rested was this:

"Workmen are to be contented with the current rate of wages, and are on no account to do anything which has a tendency to compel their employers to raise it. Practically, they could go where they pleased individually and make the best bargains they could for themselves, but under no circumstances and by no means, direct or indirect, must they bring the pressure of numbers to bear on their employers or on each other."[2]

To a reader of the twentieth century this state of the law seems no less incomprehensible than intolerable, and indeed within twenty-

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[1] Erle 33, 34.

The agreements which at the present day may be held to constitute a conspiracy have been thus summarized:

(1) Agreements to commit a substantive crime (R. *v.* Davitt, 11 Cox 676; R. *v.* Whitchurch, 24 Q. B. D. 420), *e.g.* a conspiracy to steal or to incite some one to steal.

(2) Agreements to commit any tort that is malicious.

(3) Agreements to commit a breach of contract under circumstances which are peculiarly injurious to the public.

(4) Agreements to do certain other acts which, unlike those hitherto mentioned, are not breaches of law at all, but which nevertheless are outrageously immoral or else in some way extremely injurious to the public.

See Kenny, Outlines of Crim. Law, 288–290.

The definition attributed to Lord Denman of a conspiracy as a "combination for accomplishing an unlawful end, or a lawful end by unlawful means" (see Wright 63) is, it is submitted, sound, though too vague to be of much use. Its importance lies in the emphasis it lays on the *object* or *purpose* — a very different thing from the motive — of a combination as a test of its criminal character, and in the light which it throws on the wide extension given by the law to the idea of conspiracy.

[2] 3 Steph. Hist. 209.

five years after the passing of the Combination Act, appeared utterly indefensible to so rigid an economist as McCullock, a man whose good sense and genuine humanity have been concealed from a later generation by the heavy and brutal satire of Carlyle. Who, we ask, were the tyrants who deprived working-men of all freedom, and what was the state of opinion which sanctioned this tyranny? The answer is that the men who passed the great Combination Act were not despots, and that the Act precisely corresponded with the predominant beliefs of the time.

The Parliament of 1800 acted under the guidance of Pitt. It contained among its members Fox and Wilberforce; it was certainly not an assembly insensible to feelings of humanity. The ideas of the working classes were, it may be said, not represented. This is roughly true, but artisans were no better represented in the Parliament of 1824 than in the Parliament of 1800, yet the Parliament of 1824 repealed the Combination Act and freed trade combinations from the operation of the law of conspiracy. The mere fact, which appears well ascertained, that the Combination Act of 1799 and the Combination Act of 1800, which re-enacted its provisions, passed through Parliament without any discussion of which a report remains, is all but decisive. The law of the day represented in 1800 the predominant opinion of the day.

The public opinion which sanctioned the Combination Act (which was to a great extent a Consolidation Act)[1] consisted of two elements.

The first element, though not in the long run the more important, was a dread of combinations due in the main to the then recent memories of the Reign of Terror. Does later experience enable us to say that this fear was then a mere unfounded panic? Englishmen, at any rate, who, though from a distance, had witnessed the despotism of the Jacobin Club, which it is said towards the close of its tyranny sent weekly, in Paris alone, some hundreds of citizens to the guillotine, may be excused for some jealousy of clubs or unions. The existence, at any rate, of this fear of combinations is certain; it is proved by a body of acts, — 37 Geo. 3, c. 123 (1797), 39 Geo. 3, c. 69 (1799), 57 Geo. 3, c. 19 (1817), which were directed against any treasonable or seditious society, or against any society which might turn out to foster treason or

[1] *I. e.* the Combination Act generalized provisions which had been long enforced under special Acts in respect of workmen engaged in particular kinds of manufactures. See 3 Steph. Hist. 206.

sedition. The presence in these enactments of provisions in favour of Freemasons, Quakers, and Charities[1] betrays the width of their operation and the fears of their authors. Clubs of all kinds were objects of terror.

The second element of public opinion in 1800 was the tradition of paternal government which had been inherited from an earlier age and was specially congenial to the Toryism of the day. This tradition had two sides. The one was the conviction that it was the duty of labourers to work for reasonable, that is to say, for customary, wages. The other side of the same tradition was the provision by the state (at the cost, be it noted, of the well-to-do classes and especially of the landowners) of subsistence for workmen who could not find work. The so-called "Speenhamland Act of Parliament" by which the Justices of Berkshire granted to working-men relief in proportion to the number of their families, or, to use the political slang of to-day, tried to provide for them a "living wage," is the fruit of the same policy which gave birth to the Combination Act, 1800. The sentiment of the day was indeed curiously tolerant of a sort of crude socialism. Whitbread introduced a bill authorizing justices to fix a minimum of wages, and complained of the absence of any law to compel farmers to do their duty. Fox thought that magistrates should protect the poor from the injustice of grasping employers. Pitt introduced a bill for authorizing allowances out of the public rates, including the present of a cow. Burke approved a plan for enabling the "poor" to purchase terminable annuities on the security of the rates.[2]

The Combination Act, then, of 1800 represented the public opinion of 1800.

(B) The Benthamite reform.[3] In 1824 was passed 5 Geo. 4, c. 95, which placed the whole combination law on a new basis. Its provisions have thus been summarized by Sir Robert Wright:

"In 1824 the Act of 5 Geo. 4, c. 95, repealed all the then existing Acts relating to combinations of workmen, and provided that workmen should not by reason of combinations as to hours, wages or conditions of labour, or for inducing others to refuse work or to depart from work, or for regulating 'the mode of carrying on any manufacture, trade or business or the management thereof,' be liable to any criminal proceeding or pun-

[1] Wright 23, 24.

[2] Fowle, Poor Law 66, 67.

[3] The Combination Act, 1824, 5 Geo. 4, c. 95, and the Combination Act, 1825, 6 Geo. 4, c. 129. See 3 Steph. Hist. 221; Wright 13.

ishment for conspiracy or otherwise under the statute or common law. By another section it extended a similar immunity to combinations of masters. On the other hand it enacted a penalty of two months' imprisonment for violence, threats, intimidation and malicious mischief." [1]

This Act was repealed after a year's trial and was replaced by the Combination Act, 1825, 6 Geo. 4, c. 129, which also has been thus summarized by Wright:

"This Act again repealed the older statutes, but without mention of common law. It provided summary penalties for the use of violence, threats, intimidation, molestation, or obstruction by any person for the purpose of forcing a master to alter his mode of business, or a workman to refuse or leave work, or of forcing any person to belong or subscribe or to conform to the rules of any club or association. It did not expressly penalize any combination or conspiracy, and it exempted from all liability to punishment the mere meeting of masters or workmen for settling the conditions as to wages and hours on which the persons present at the meeting would consent to employ or serve." [2]

Even a trained lawyer may fail at first sight to perceive wherein lies the difference between the two Acts, or to conjecture why the one was substituted for the other, yet it will be found that the similarity and the difference between the two enactments are equally important, and that, whilst the repeal of the earlier Act is perfectly explainable, the singular course of legislation in 1824 and 1825 is the exact reflection of the current of opinion. Each point merits separate consideration.

As to the points of similarity. Both Acts aim at the same object; they both reverse the policy of 1800, and are intended to establish free trade in labour; they both, as a part of such freedom of trade, concede to men and to masters alike the right to discuss and agree together as to the terms on which they will sell or purchase labour; both give expression to the idea that the sale or purchase of labour should be as entirely a matter of free contract as the purchase of boots and shoes. Both Acts therefore repeal the great Combination Act and all earlier legislation against trade combinations. Both Acts, lastly, impose severe penalties on the use of violence, threats, or intimidation whereby the contractual freedom of an individual workman or an individual master may be curtailed, and both Acts provide the machinery whereby these penalties may be summarily enforced. The labour contract under

[1] Wright 13.

[2] Wright 13.

each Act is intended to be perfectly and strictly free. Combinations to raise or lower wages and the like are no longer forbidden, but neither individuals nor combinations are to interfere with the right of each person freely to enter into any labour contract which may suit the contracting parties.

As to the difference. The Act of 1824 allows freedom of combination for trade purposes, both to men and to masters in the very widest terms,[1] and (what is the matter specially to be noted) exempts trade combinations from the operation of the law of conspiracy. It then imposes penalties upon the use of violence, threats, or intimidation for certain definite purposes, *e.g.*, the compelling a workman to depart from his work.

The Combination Act, 1825, on the other hand, in the first place, imposes penalties upon the use of violence, threats, or intimidation for almost any purpose which could conceivably interfere with individual freedom of contract on the part of an individual workman or with the right of a master to manage his business in the way he thought fit. The Act, in the next place, confers indirectly[2]

[1] Sect. 2 exempts from liability "to any indictment or prosecution for conspiracy, or to any other criminal information or punishment whatever, under the common or the statute law," "journeymen, workmen, or other persons who shall enter into any combination to obtain an advance, or to fix the rate of wages, or to lessen or alter the hours or duration of the time of working, or to decrease the quantity of work, or to induce another to depart from his service before the end of the time or the term for which he is hired, or to quit or return his work before the same shall be finished, or, not being hired, to refuse to enter into work or employment, or to regulate the mode of carrying on any manufacture, trade, or business, or the management thereof." Under this section a combination of X, Y, and Z to induce a workman to break a contract of work or to induce a master to dismiss all workmen who were not trade unionists, would *semble*, not have been a conspiracy. Sect. 3 gives an analogous exemption to masters.

[2] Sect. 4. "Provided always . . . that this Act shall not extend to subject any persons to punishment, who shall meet together for the sole purpose of consulting upon and determining the rate of wages or prices, which the persons present at such meeting, or any of them, shall require or demand for his or their work, or the hours or time for which he or they shall work in any manufacture, trade or business, or who shall enter into any agreement, verbal or written, among themselves, for the purpose of fixing the rate of wages or prices which the parties entering into such agreement, or any of them, shall require or demand for his or their work, or the hours of time for which he or they will work, in any manufacture, trade or business; and that persons so meeting for the purposes aforesaid, or entering into any such agreement as aforesaid, shall not be liable to any prosecution or penalty for so doing; any law or statute to the contrary notwithstanding." Section 5 provides an analogous exemption for meetings of masters to settle the rate of wages, etc.

A comparison between the Act of 1824, section 2, and the Act of 1825, section 3, shows that the liberty of combination allowed under the first Act is a good deal wider than that allowed under the second.

upon workmen and masters a limited right to meet together and come to agreements for settling the rate of wages, and the like, which the persons present at the meeting will accept or give. The Act, lastly, revives the law of conspiracy in regard to trade combinations.

The result, therefore, of the Combination Act, 1825 (at any rate, as interpreted by the courts), was this:

Any trade combination was a conspiracy unless it fell within the limited right of combination given by the Act of 1825.[1]

A strike, though not necessarily a conspiracy, certainly might be so, and a trade union, as being a combination in restraint of trade, was at best a non-lawful society,[2] *i. e.*, a society which, though membership in it was not a crime, yet could not claim the protection of the law.

The course of parliamentary legislation with regard to the combination law in 1824 and 1825 was singular, but in all its features it exactly represents the dominant opinion, that is, the Benthamite individualism of the day. The Act of 1824 was the work of known Benthamites. McCullock advocated its principles in the "Edinburgh Review"; Joseph Hume brought it as a bill into Parliament; the astuteness of Francis Place, in whose hands Hume was a puppet, made it possible to pass into law a bill, of which the full effect was not perceived, either by its advocates or by its opponents. The Act gives expression in the simplest and most direct form to two convictions pre-eminently characteristic of the Benthamites and the political economists. The one is the belief that trade in labour ought to be as free as any other kind of trade; the other is the well-grounded conviction that there ought to be one and the same law for men as for masters. Adam Smith had some fifty years before pointed out that trade combinations on the part of workmen were blamed and punished, whilst trade combinations on the part of masters were neither punished nor indeed noticed.[3] Liberty and equality, each of which represent the best aspect of *laissez faire*, were the fundamental ideas embodied in the Act of 1824.

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[1] This Act "left the common law of conspiracy in force against all combinations in restraint of trade, the combinations exempted from penalty under ss. 4 and 5 alone excepted." Erle 58. This is, it is submitted, the right view of the law. Contrast however 3 Stephen, Hist. 223.

[2] Farrer *v.* Close (1869), L. R. 4 Q. B. 602.

[3] See Wealth of Nations, ch. viii. pp. 97–102 (6th ed. 1791).

Why, then, was the Act of 1824 repealed and replaced by the Act of 1825?

Something — even a good deal — was due to accidental circumstances. In spite of the sagacious advice of Francis Place, workmen who were unused to the right of combination used their newly acquired power with imprudence, not to say unfairness. A large number of strikes took place, and these strikes were accompanied by violence and oppression. The artisans of Glasgow "boycotted," as we should now say, and tried to ruin an unpopular manufacturer. The classes whose voices were heard in Parliament were panic struck, and their alarm was not unreasonable. Hence the demand for the repeal of the Combination Act, 1824. Place, after his manner, attributes the success of this demand to the baseness of parliamentary statesmen, to the bad faith of Huskisson, and, above all, to the machinations of one politician, who "lied so openly, so grossly, so repeatedly, and so shamelessly" as to astonish even the critic, who had always considered this individual "a pitiful, shuffling fellow."[1] This pitiful, shuffling fellow was the well-known Sir Robert Peel.[2] He had, at any rate, as we might expect, something which is worth hearing to urge in support of his conduct. Peel has left on record the ground of his opposition to the Act of 1824. It is that "sufficient precautions were not taken in [that Act] . . . to prevent that species of annoyance which numbers can exercise towards individuals, short of personal violence and actual threat, but nearly as effectual for its object."[3]

Here we pass from the transitory circumstances of a particular year and touch the true, if unperceived, cause of the reaction against the Combination Act of 1824. The right of combination which was meant to extend personal freedom was so used as to menace the personal freedom both of men and of masters. By the legislation of 1824 Benthamites and economists, that is, enlightened individualists, had extended the right of combination in order to enlarge the area of individual freedom; by the Act of 1825 sincere individualists, among whom Peel may assuredly be numbered, limited the right of trade combination in order to preserve the contractual freedom of workmen and of masters. The men who passed the Act of 1824 meant to establish free trade in labour, they did

[1] Life of F. Place, 236.

[2] Then Mr. Peel.

[3] Peel's Private Correspondence, 379 (London, 1891).

not mean to cut short the contractual capacity of persons who preferred not to join or resisted the policy of trade unions. The two Acts which seem contradictory are in reality different applications of that *laissez faire* which was a vital article of the utilitarian creed; the economists and Liberals who in 1824 had begun to guide legislative opinion were the sincerest and most enthusiastic of individualists. It is hard for the men of 1904 to realize how earnest eighty years ago was the faith of the best men in England in individual energy and in the wisdom of leaving every one free to pursue his own course of action as long as he did not trench upon the like liberty or the rights of his fellows. To such reformers oppression exercised by the state was not more detestable than oppression exercised by trade unions. Place was a Benthamite fanatic. His finest characteristic was passionate zeal for the interest of the working class whence he sprung. He knew workmen well, he had no love for employers. Yet Place, and we may be sure many wiser men with him, believed and hoped that the repeal of the combination law of 1800 would put an end to trade unions.

"The combinations of the men are but defensive measures resorted to for the purpose of counteracting the offensive ones of their masters . . . when every man knew that he could carry his labour to the highest bidder, there would be less motive for those combinations which now exist, and which exist because such combinations are the *only* means of redress that they have." [1]

So Place in 1825. Eighteen years later thus writes Richard Cobden:

"Depend upon it nothing can be got by fraternising with trade unions; they are founded upon principles of brutal tyranny and monopoly. I would rather live under a Dey of Algiers than a trades committee." [2]

In 1850 Miss Martineau is well assured that the Act of 1825 was a necessary and salutary measure:

"By this act [*i. e.* the Combination Act, 1825] combinations of masters and workmen to settle terms about wages and hours of labour are made legal; but combinations for controlling employers by moral violence were again put under the operation of the common law. By this as much was done for the freedom and security of both parties as can be done by legislation, which, in this matter, as in all others, is an inferior safeguard to that of personal intelligence." [3]

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[1] Life of F. Place, p. 217, and see further p. 218.

[2] Cobden, 1 Morley, ch. xiii. p. 299.

[3] 1 H. Martineau's Thirty Years' Peace (ed. 1877) 474.

What is of even more consequence, the best and wisest of the judges who administered the law of England during the fifty years which followed 1825 were thoroughly imbued with Benthamite Liberalism. They believed that the attempt of trade unions to raise the rate of wages was something like an attempt to oppose a law of nature. They were convinced — and here it is difficult to assert that they erred — that trade unionism was opposed to individual freedom, that picketing, for example, was simply a form of intimidation, and that though a strike might in theory be legal, a strike could in practice hardly be carried out with effect without the employment of some form of intimidation either towards masters or non-unionists. No judges have ever deserved or earned more respect than Erle and Bramwell, yet Erle deliberately maintained that under the Act of 1825 any combination might be a conspiracy that interfered with "the free course of trade," whilst Bramwell enounced the doctrine that "the liberty of a man's mind and will to say how he shall bestow himself and his means, his talents and his industry, is as much a subject of the law's protection as that of his body." His language is as wide as possible:

"Generally speaking, the way in which people have endeavoured to control the operation of the minds of men is by putting restraints on their bodies, and therefore we have not so many instances in which the liberty of the mind is vindicated as that of the body. Still, if any set of men agreed amongst themselves to coerce that liberty of mind and thought by compulsion and restraint, they would be guilty of a criminal offence, namely, that of conspiring against the liberty of mind and freedom of will of those towards whom they so conducted themselves. I am referring to coercion and compulsion — something that is unpleasant and annoying to the mind operated upon; and I lay it down as clear and undoubted law that, if two or more persons agree that they will by such means co-operate together against that liberty, they are guilty of an indictable offence."[1]

Bramwell's doctrine moreover, laid down in 1867, harmonizes with that treatise of Mill "On Liberty," which was the final and authoritative apology for the Benthamite faith in individual freedom.

We may feel therefore assured that the legislation of 1824–25 was not intentionally unjust, and represented even in its fluctuation the best and most liberal opinion of the time. The individualism of 1825 is open to one comment: individualists, whether jurists or

[1] R. *v.* Druitt (1867), 10 Cox 600, per Bramwell, B., cited 3 Steph. Hist. 221, 222.

economists, had not then and indeed never have fully recognised the characteristics of combined action. In common with the revolutionary reformers of France they recognised as a fact the power of the state and the rights of individuals, but they never studied the mode in which individual action is modified when you consider men, not as isolated from their fellows, but as members of society or of special societies. They saw, and saw truly, that the need of the time was, at any rate as regards trade, to free workmen and masters from the trammels imposed by law on individual action. They did not see the difficulty of reconciling individual freedom with the right of association; they could not supply the solution of a problem whereof they hardly acknowledged the existence. A few lines in Mill, "On Liberty," are all the reference he makes to the proper limits of combined action. He and the school to which he belonged seemed to have held that when once the area of individual liberty was defined it was unnecessary to lay down any rules either of law or of morality for fostering or checking the use of the power arising from combination. In any case the doctrine both of Mill and of his teachers is uncertain and indistinct, and indistinctness of belief always begets inconsistency of action. The combination law of 1825 stood almost unaltered for fifty years. The experiment of trying to establish free trade in labour was probably a wise one; whether the Act of 1825 ought to have been repealed may still admit of discussion. Two things are certain. Its provisions caused dissatisfaction, and the Liberals of the day, imbued in the main with Benthamite doctrine, could provide no clear principle for its amendment.

(C) The compromise of 1875.[1] This compromise revolutionized the combination law. It is marked by the following characteristics:

First. No trade combination on the part either of employers or workmen to do any act which if committed by one person would not be punishable as a crime can, since the passing of the Act of 1875, be *indictable* as a conspiracy.[2] Hence,

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[1] The Conspiracy and Protection of Property Act, 1875, 38 & 39 Vict. c. 86; the Trade Union Act, 1871, 34 & 35 Vict. c. 31; the Trade Union Act, 1876, 39 & 40 Vict. c. 22.

[2] "An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime." Conspiracy and Protection of Property Act, 1875, s. 3, 1st clause. Contrast the language of the Combination Act, 1824 (5 Geo. 4, c. 95), s. 2, enacting that any journeyman, workman, or other persons who enter (to

Secondly. A trade combination is placed in a different position from that occupied by combinations which are not trade combinations, for whilst a trade combination cannot be indictable as a conspiracy unless it is a combination to do an act which may be a crime if done by an individual acting alone, a combination which is not a trade combination may be indictable as a conspiracy, even though it is a combination to do an act which would not be a crime if done by an individual if acting alone.

X, acting alone, leaves the employment of a manufacturer, A, without due notice and in breach of his contract of service. X does not commit a crime. X, Y, and Z form a trade combination for the purpose of simultaneously leaving the employment of A without due notice and in breach of their contract of service. The combination of X, Y, and Z is, under the Conspiracy and Protection of Property Act, 1875, not an indictable conspiracy.

X, on the other hand, a tenant of a landlord A, declines to pay his rent. X has not committed a crime, but at most a breach of contract.

X, Y, and Z, tenants of A, enter into a combination not to pay rent to A. This combination, which has no reference to a trade dispute and therefore does not fall within the Conspiracy and Protection of Property Act, 1875, is or may be indictable as a criminal conspiracy.

Thirdly. Trade unions which under the Combination Act, 1825, were at best non-lawful societies as being in restraint of trade, are, under the Trade Unions Act, 1871 and 1876, not to be held unlawful societies on the mere ground that their purposes are in restraint of trade.[1] A trade union, in short, is *prima facie* a lawful society, though of course it may, like any other association, become an unlawful society if it is formed for or pursues unlawful objects. Persons therefore, whether trade union officials or others, who defraud a union, *e. g.* embezzle its funds, are punishable like any other persons guilty of embezzlement; but though trade unions are lawful societies, trade union contracts, that is, agreements between the members of a trade union or between two trade unions, are in general not directly enforceable by law.[2]

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put the matter shortly) into any trade combination "shall not therefore be subject or liable to any indictment or prosecution for conspiracy or to any other criminal information or punishment whatever under the common or the statute law."

[1] Trade Union Act, 1871, ss. 2, 3.

[2] See Trade Union Act, 1871, s. 4.

To put the matter broadly the trade union is a lawful club but a club of which the

Fourthly. Any person guilty of intimidation or annoyance to any other person, *e.g.* a fellow workman, with a view to interfering with such workman's legal freedom of action or who with this view does certain specific injuries to such other workman, *e.g.* besets his dwelling-house, is guilty of an offense punishable with imprisonment, whence it follows that a combination to commit such offense or crime is a conspiracy, but "picketing" — I purposely use popular, not technical language — is, in reality, more or less legalised, as long as it is moderate picketing which does not amount to intimidation.

The general character of the compromise of 1875 is unmistakable. It constitutes a modification of the combination law, which is greatly in favour of workmen, at any rate in so far as they are trade unionists. The policy of 1800 is distinctly reversed. In 1800 trade combinations, whether temporary combinations, such as strikes, or permanent combinations, such as trade unions, were regarded by the law with the gravest disfavour. It is extremely doubtful whether any one who participated in such combinations could avoid committing a crime. In 1875 trade combinations are greatly favoured by the law; they are not indictable as conspiracies in cases in which other combinations may be indictable as conspiracies. Trade unions, though not made corporate bodies, are lawful societies. The compromise, further, is, from the point of view of trade unionists, a great advance on the combination law of 1825. In 1825 the liberty given to trade combinations was extremely limited, and severe penalties were imposed on every kind of intimidation of which workmen on strike or trade unions might conceivably be guilty. Under the compromise of 1875 freedom of combination is extended further than even under the Act of 1824,[1] and only a limited number of definite acts remain punishable under the head of intimidation. But the compromise, though favourable to trade unionists, is a compromise. The legislature has clearly intended to provide for the protection of individuals, whether masters or workmen, whose legal liberty of action might be infringed by trade combinations; and the effect of the compromise was in 1875, on some points, open to doubt.

A study of the Act of 1875 and the other enactments with which it ought to be read, as well as the known facts of history,

courts will not directly enforce the rules, *e. g.* as to payment of subscriptions and the like, as against any member.

[1] See *ante*, p. 521, n. 1.

easily explain the state of opinion which gave birth to the compromise of 1875. The Benthamite reform of 1825 was dominated throughout by the desire of the Benthamite reformers, who were stringent individualists, to protect at all costs every individual's contractual capacity. The Act, moreover, of 1825 had been interpreted by magistrates who were themselves individualists, and who, following the guidance of Parliament, used the law of conspiracy to check combinations which aimed at purposes in restraint of trade, and moreover to protect individual freedom of action. Hence, for fifty years, a conflict between the law, as expounded by the courts, and the habits and wishes of trade unionists. The judges held that, though a strike in itself might be legal, a strike almost inevitably led to acts which were criminal. Trade unionists, on the other hand, who at one time (1832–50) accepted, in name at least, the doctrine of *laissez faire*, interpreted it as allowing unlimited freedom of combination for any objects which were not distinctly criminal, and held that if a strike was legal, conduct such as picketing, necessary to the maintenance of a strike, could not be a crime. By 1875 two changes had taken place: the force of individualism had declined, and in many branches of the law could be traced the rising authority of collectivism. Meanwhile the artisans had obtained the parliamentary franchise, and there existed among Liberals and also among Conservatives a tendency to overrate the wisdom and the virtues of working-men. Hence the ideas of trade unionists, which in 1861 were utterly unrepresented in a middle-class Parliament,[1] received at least the attention which was their due in the more or less democratic Parliament of 1875. The old ideas, however, congenial to individualism, and inherited from the reformers of 1832, were still potent. No English Parliament was prepared to leave individual freedom unprotected against combined numbers. This was a condition of opinion which naturally produced a compromise, and a compromise favourable, on the whole, to working-men; and such favour was the more natural because, in England at any rate, trade union leaders had, on the whole, exercised their power with moderation.

(D) The judicial interpretation of the compromise. The legislation of 1875 left many questions open: What was the true position of a trade union? What were the principles on which

[1] Mill, Rep. Gov. 56, 57.

to determine whether a combination of any kind was a conspiracy at common law? Could an individual who suffered damage through a trade combination recover damages in an action where under the Conspiracy and Protection of Property Act, 1875, the combination was not indictable as a conspiracy?

These and other inquiries of the same sort were left to the decision of the courts. Trade unionists and many lawyers believed that they must all be answered in the way most favourable to the free action of the unions. Since 1885, however, cases requiring the interpretation of the compromise of 1875 have come frequently before the courts. The exact effect of the judgments delivered is in some degree a subject of dispute. The following principles, however, may (it is submitted) be deduced from decided cases.

1. An act lawful in itself is not by the mere existence of a bad *motive* converted into an unlawful act so as to render the doer thereof liable to an action by a person who suffers damage from such act.[1]

But note that the *motive* influencing the doer of an act is in itself a totally different thing, though often confounded with the *purpose* or *object* for the attainment of which he does the act.

2. Acts which are not in themselves unlawful when done by persons acting in combination, solely with the lawful object of protecting their trade and increasing their profits, are not actionable.[2]

3. A combination of X, Y, and Z to do an act which, if done by X alone, would not be either criminal or wrongful, may be a conspiracy.[3]

4. A combination of X, Y, and Z to break, or to cause others to break, a contract with A, or (*semble*) to induce others not to enter into contracts with A, is, in the absence of distinct legal justification, a conspiracy, and gives A, if damaged thereby, a cause of action.[4]

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[1] Allen *v.* Flood, [1898] A. C. 1; Quinn *v.* Leathem, [1901] A. C. 495; Stevenson *v.* Newnham (1853), 13 C. B. 297.

[2] Mogul Steamship Co. *v.* McGregor, [1892] A. C. 25; 23 Q. B. D. (C. A.) 598. In other words, trade competition is considered beneficial to the public, and acts legal in themselves do not become actionable because they are done by persons acting in combination solely for the purpose of trade competition.

[3] Mogul Steamship Co. *v.* McGregor, [1892] A. C. 25, 45, judgment of Bramwell, and 23 Q. B. D. 598, 616, judgment of Bowen, L. J.

[4] Quinn *v.* Leathem, [1901] A. C. 495; Temperton *v.* Russell, [1893] 1 Q. B. (C. A.) 715.

5. The Conspiracy and Protection of Property Act, 1875, s. 3, has nothing to do with civil remedies ; a trade combination, that is to say, of X, Y, and Z, which is not indictable as a conspiracy, may yet, if it damages A, give A a right of action.[1]

6. A registered, and probably an unregistered, trade union is liable to be sued for torts committed by its agents; and also, it would seem, is competent to sue as a plaintiff.

The interpretation put by the courts on the compromise of 1875 is, it is submitted, from a legal point of view, thoroughly sound, and will commend itself to men of whatever party who still hold that personal liberty is the basis of national welfare. But this interpretation does undoubtedly deprive trade unionists of advantages which, in common with many lawyers, they believed that they had obtained under the Act of 1875. It is now, at any rate, abundantly clear that neither trade unions nor any other associations can under English law possess property without incurring that liability to pay damages for wrongs done by themselves or by their agents which attaches to all property holders. In a sense, therefore, the interpretation put by the courts upon the Act of 1875, and other enactments connected with it, does mark a reaction not against the provisions of that Act, but against the tendency so to construe them as to confer upon trade unions a position of privilege.

The causes of this reaction are to be found in the current of opinion, and indeed might be all summed up in the existence of the one word "boycott." The term, which has obtained a world-wide acceptance, came into being during the autumn of 1880.[2] It spread far and wide because it supplied a new name for an old social disease which had reappeared in a new and most dangerous form. It bore witness to the pressing peril that freedom of combination might, if unrestrained, give a death-blow to individual liberty.

The results, then, of our survey can be thus summed up:

The combination law has from the end of the eighteenth century precisely corresponded with the course of opinion.

The Combination Act, 1800, represents the panic-stricken but paternal Toryism of that date.

The Combination Acts, 1824, 1825, even in their singular fluc-

[1] Quinn *v.* Leathem *supra;* Glamorgan Coal Co. *v.* South Wales Miners Fed., [1903] 2 K. B. (C. A.) 505; Giblan *v.* National, etc., Union, [1903] 2 K. B. (C. A.) 600.

[2] See "Boycott" in Murray's Dictionary.

tuation, precisely correspond with the Benthamite ideal of free trade in labour.

The compromise of 1875 represents in the main the combined influence of democracy and collectivism.

The interpretation of that compromise by the courts represents the belief, still strong in England, in the sacredness of individual liberty and the sense of the peril to which personal liberty is exposed by an unrestricted right of combination.

The very confusion of the present state of the law corresponds with and illustrates a confused state of opinion. We all of us in England still fancy at least that we believe in the blessings of freedom, yet, to quote an expression which has become proverbial, "to-day we are all of us socialists." The confusion reaches much deeper than a mere opposition between the beliefs of different classes. Let each man, according to the advice of preachers, look within. He will find that inconsistent social theories are battling in his own mind for victory. Lord Bramwell, the most convinced of individualists, became before his death an impressive and interesting survival of the beliefs of a past age; yet Lord Bramwell himself writes to a friend, "I am something of a socialist." If, then, the law be confused, it all the more accurately reflects the spirit of the time.

A. V. Dicey.

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